

NOT TO BE INCLUDED
IN BOUND VOLUMES

PHG
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILUM TEXTILE SERVICES CO.

and

Cases	28-CA-20898
	28-CA-20906
	28-CA-20973
	28-CA-21050
	28-CA-21203

UNITE HERE!

ORDER DENYING MOTION

On December 30, 2011, the National Labor Relations Board issued a decision in this proceeding¹ finding that the Respondent violated Sections 8(a)(1) and (3) of the Act in numerous respects and that those unfair labor practices warranted the imposition of a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).² Thereafter, the Respondent filed a Motion to Reopen the Record. The Respondent argues that the bargaining order is inappropriate and it wishes to introduce allegedly previously unavailable evidence concerning (1) the passage of time since the unfair labor practices occurred in 2006, (2) employee turnover since March 4, 2006, the date the Union

¹ *Milum Textile Services Co.*, 357 NLRB No. 169.

² The Board entered final rulings on all but one issue, which it remanded to the administrative law judge. Member Hayes dissented in part, including as to the issuance of the bargaining order.

established majority status, and (3) the absence of any unfair labor practice charges filed against it since it received the Administrative Law Judge's decision in October 2007. The Respondent has also attached to its motion a "declaration" from its president, elaborating, *inter alia*, on its employee turnover contentions.³

Having duly considered the matter, we deny the Respondent's motion to reopen the record for the reasons stated below.

In the underlying decision, the Board found that the Respondent committed several Section 8(a)(1) violations, including seeking to enjoin clearly protected Section 7 activity in federal court, granting a benefit, interrogating employees, implicitly threatening to reduce employees' wages if they selected the Union, prohibiting employees from wearing union buttons while working, and giving employees the impression that their union activities were under surveillance. Further, the Respondent violated Section 8(a)(3) by discriminatorily discharging two employees and suspending a third. The Board, reversing the judge, found that these unfair labor practices met the standard for a category II *Gissel* bargaining order. The Board emphasized that the discriminatory discharges, as "hallmark" violations, "are more likely to destroy election conditions for a longer period of time than are other unfair labor practices because they tend to reinforce the employees' fear that they will lose their employment if union activity

³ The Acting General Counsel filed an opposition to the Respondent's motion, and a motion to strike the Respondent's "declaration" (referring to it as an "affidavit"). The Charging Party Union filed an opposition to the motion, and the Respondent filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

persists.”⁴ Finally, the Board considered and rejected the Respondent’s argument that the passage of time since the unfair labor practices were committed weighed against a bargaining order because “the Board’s established practice is to evaluate the appropriateness of a *Gissel* bargaining order as of the time that the unfair labor practices occurred; changed circumstances following the commission of the violations are generally not considered.”⁵ In issuing the bargaining order, the Board found that the rights of those employees who may oppose the Union are sufficiently protected by the Board’s decertification procedure under Section 9(c)(1) of the Act.

As it did on brief to the Board, the Respondent asserts in its motion that a bargaining order is inappropriate. First, it contends that the Board “expressly refused to consider whether the passage of time” between the commission of the unfair labor practices and the issuance of the Decision and Order (more than 5 years) weighs against imposing a remedial bargaining order. It cites D.C. Circuit precedent holding that the Board must consider the appropriateness of a bargaining order at the time the order is issued, including considering the passage of time and employee turnover.⁶ Second, regarding employee turnover, the Respondent contends that, of the approximately 70 employees employed on the date that the Union established a majority, 9 remain employed by the Respondent, and of the 42 who the Board found signed the petition, only 3 remain.⁷

⁴ *Milum Textile Services*, above, slip op. at 9 (quoting *Traction Wholesale Center Co., Inc.*, 328 NLRB 1058, 1077 (1999), enf. 216 F.3d 92 (D.C. Cir. 2000)).

⁵ *Id.*, slip op. at 10 (citing *Evergreen America Corp.*, 348 NLRB 178, 181-182 (2006), enf. 531 F.3d 321 (4th Cir. 2008)).

⁶ See, e.g., *Cogburn Health Center, Inc., v. NLRB*, 437 F.3d 1266 (D.C. Cir. 2006).

⁷ It is not clear whether the remaining employees include the unlawfully discharged employees who were ordered reinstated.

Section 102.48(d)(1) of the Board's Rules and Regulations provides that a motion to reopen the record must state why the additional evidence, if adduced and credited, "would require a different result." Although the Respondent contends that, under D.C. Circuit precedent, the passage of time and employee turnover make the bargaining order inappropriate, the Board's long-established policy is to assess the propriety of a bargaining order as of the time that the respondent committed the violations.⁸ Consistent with this policy, the Respondent's additional evidence is irrelevant to the issuance of the *Gisse/* bargaining order.

Nevertheless, even if we were to consider the Respondent's evidence of employee turnover, it would not change the result.

In the underlying decision, the Board found that "knowledge of the [Respondent's] violations was disseminated throughout the workforce and significantly affected union support."⁹ It is likely that this same process of dissemination would reach newly hired employees as well, whose support for the Union may well be affected by accounts of past unfair labor practices.¹⁰ In this respect, nothing in the Respondent's

The Respondent presented evidence at the hearing that 1 year after the unfair labor practices, 30 percent of the Union's supporters remained, and it argued on brief to the Board that turnover made a bargaining order inappropriate.

⁸ *Action Auto Stores, Inc.*, 298 NLRB 875 (1990), enfd. mem. 951 F.2d 349 (6th Cir. 1991). As we have stated before, "we respectfully continue to disagree with those courts of appeals which have expressed a contrary view of employee turnover as a factor to be considered in determining the propriety of a bargaining order." *Highland Plastics, Inc.*, 256 NLRB 146, 147 fn. 9 (1981). Further, this case arose in the Ninth Circuit, where, consistent with our policy, "changed circumstances during intervals of adjudication 'have been held irrelevant to the adjudication of enforcement proceedings.'" *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 635 (9th Cir. 2007) (quoting *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1448 (9th Cir. 1991)).

⁹ *Milum Textile Services*, above, slip op. at 9.

¹⁰ "As the Fifth Circuit has recognized, '[p]ractices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original

motion affects our prior finding that the Respondent's unlawful discharge of two union adherents would remain in employees' memories for a long time. Further, as of the filing of the instant motion, the Respondent's president remains in the same position he occupied when he committed the hallmark violations. The Board in the underlying decision emphasized that his involvement in the unfair labor practices heightened their coercive effect.¹¹ His continued presence at the top of the company weighs in favor of the bargaining order, notwithstanding employee turnover.¹²

In sum, even if the Respondent's new evidence were adduced and credited, the Respondent has not shown that the evidence would require a different result.¹³

Accordingly, we deny the Respondent's motion.¹⁴

IT IS ORDERED that the Respondent's motion to reopen the record is denied.

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

participants have departed.” *California Gas Transport, Inc.*, 347 NLRB 1314, 1326 (2006) (quoting *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978) (enforcing bargaining order)), *enfd.* 507 F.3d 847 (5th Cir. 2007).

¹¹ *Milum Textile Services*, above, slip op. at 9.

¹² *California Gas Transport*, above (bargaining order appropriate where, inter alia, there was no contention that managers or supervisors who committed violations had left respondent's employment); *Action Auto Stores, Inc.*, above at 875.

¹³ We also reject the Respondent's argument that the lack of new unfair labor practice charges filed against the Respondent since the judge issued her decision militates against a bargaining order. *Electro-Voice, Inc.*, 321 NLRB 444, 445 (1996) (stating that the Board does not consider the absence of subsequent unfair labor practices in determining the appropriateness of a bargaining order).

¹⁴ In light of the disposition here, we find it unnecessary to reach the Acting General Counsel's argument that the Respondent's motion is untimely, and the Acting General Counsel's motion to strike the Declaration of Craig Milum.

MEMBER HAYES, dissenting.

I dissented from the issuance of the bargaining order in the underlying decision, and I adhere to that position. The Respondent's proffered evidence indicates that there has been a nearly complete turnover in the workforce since the unfair labor practices were committed, which further undermines the case for a bargaining order. In addition, the Respondent has filed a petition for review with the D.C. Circuit, which has repeatedly instructed the Board to consider the appropriateness of a bargaining order at the time the order is issued.¹⁵ Under these circumstances, I would grant the Respondent's motion.

Brian E. Hayes, Member

Dated, Washington, D.C. March 23, 2012.

(SEAL)

NATIONAL LABOR RELATIONS BOARD

¹⁵ See, e.g., *Cogburn Health Center, Inc., v. NLRB*, 437 F.3d 1266 (D.C. Cir. 2006).